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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY LEE ANDREWS,

Defendant and Appellant.

G051067

(Super. Ct. No. 12WF1461)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Reversed and remanded for further proceedings.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

Danny Lee Andrews appeals from a judgment after a jury convicted him of second degree robbery and attempted second degree robbery and the trial court found true he suffered prior serious felony convictions. Andrews argues insufficient evidence supports one of his prior convictions, a 2005 federal bank robbery conviction. The Attorney General concedes the issue. We reverse and remand for further proceedings.

FACTS

One April 2012 afternoon, Maria Vega was working as a bank teller. Andrews handed her a note that read, ““This is a holdup. Give me all your [100’s] and 50[’]s, and no one will get hurt.”” Vega called her supervisor, Alejandro Galvan, to show him the note. Galvan alerted security. Andrews said, ““What’s wrong? Are you going to give me anything?”” He eventually left. Both Vega and Galvan identified Andrews as the man who tried to rob the bank from photographic lineups.

One June 2012 afternoon, Melanie Boose was working as a bank teller. Andrews handed her a note telling her to give him all her 20’s and 50’s or risk being harmed. He said, ““No dye packs and no alarms.”” She gave him bills, some of which were traceable, totaling \$2,583. Andrews left with the money. Boose told Cynthia Le, a bank officer, she had been robbed, and Le called the police. Both Boose and Le identified Andrews as the man who robbed the bank from photographic lineups. Andrews was arrested days later.

An amended information charged Andrews with second degree robbery of Boose (Pen. Code, §§ 211, 212.5, subd. (c), all further statutory references are to the Pen. Code) (count 1), and attempted second degree robbery of Vega (§§ 664, subd. (a), 211, 212.5, subd. (c)) (count 2).¹ The information alleged Andrews suffered the following: two prior strike convictions (§§ 667, subds. (d) & (e)(2)(A), 1170.12,

¹ The amended information also charged Andrews with a third count, second degree robbery, but the jury deadlocked on that count. The trial court later dismissed that count on the prosecution’s motion.

subds. (b) & (c)(2)(A)), and two prior serious felonies (§ 667, subd. (a)(1)). The convictions arose from a September 1974 second degree robbery conviction (§§ 211, 212.5, subd. (c)), in Orange County and a July 2005 bank robbery conviction (18 U.S.C. 2113), in the Central District of California (the Federal Conviction). The information also alleged Andrews suffered four prior prison terms (§ 667.5, subd. (b)).

The jury convicted Andrews of counts 1 and 2. At a bifurcated bench trial, the trial court found true Andrews had suffered all the prior conviction allegations. The court based its judgment on certified court records (§ 969b), and “Westlaw citing bank robbery crimes.”

The trial court sentenced Andrews to prison for 60 years to life as follows: count 1-25 years to life; count 2-25 years to life; and two five-year terms for the prior serious felony convictions (§ 667, subd. (a)(1)). The court struck the sentences for the four prior prison term allegations (§ 667.5, subd. (b)).

DISCUSSION

Andrews argues insufficient evidence supports the trial court’s finding the Federal Conviction qualified as a serious felony and strike. The Attorney General concedes the issue, asking only that we do not preclude retrial of the prior conviction allegation.

To qualify as a strike under the Three Strikes law, a prior conviction must be a serious felony, as defined in section 1192.7, subdivision (c), or a violent felony, as defined in section 667.5, subdivision (c). The prosecution must prove the serious or violent nature of the offense beyond a reasonable doubt, and may do so with court documents prepared contemporaneously with the conviction by a public officer charged with that duty, such as an abstract of judgment. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082 (*Miles*)). “However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious

form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred.” (*Id.* at p. 1083.)

“On the other hand, the trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. [Citations.] [¶] On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]” (*Miles, supra*, 43 Cal.4th at p. 1083.)

Title 18 United States Code section 2113(a) can be violated in two ways. The first requires the taking of bank property by force, violence, or intimidation. (18 U.S.C. § 2113(a), 1st par.) This corresponds generally to bank robbery, which is a strike. (*Miles, supra*, 43 Cal.4th at pp. 1081-1082; see §§ 667, subd. (d)(1), (2), 1170.12, subds. (b)(1), (2).) The second requires entering a bank with the intent to commit a felony therein. (18 U.S.C. § 2113(a), 2d par.) This essentially corresponds to commercial burglary, which is not a strike. (*Miles, supra*, 43 Cal.4th at pp. 1082 & fn. 6, 1085-1087; see §§ 667.5, subd. (c)(21).)

“Thus, evidence that the defendant suffered a previous conviction under [Title 18 United States Code] section 2113(a), standing alone, cannot establish that the conviction was for a serious felony under California law.” (*Miles, supra*, 43 Cal.4th at

p. 1082.) There must be, in addition, evidence in the record of the prior conviction that the conviction involved a robbery rather than a burglary. (*Id.* at pp. 1082-1083.) In *Miles*, there was additional evidence, aggravating conduct (18 U.S.C. § 2113(d) & (e)), in the record that the conviction involved a robbery and not a burglary and thus the court concluded there was sufficient evidence. (*Miles, supra*, 43 Cal.4th at p. 1094.)

The certified records from the United States Department of Justice Federal Bureau of Prisons submitted here did not include additional facts concerning the nature of the Federal Conviction beyond a bare reference to 18 U.S.C. § 2113(a). As an aside, we recognize the trial court also relied on exhibit No. 5, “Westlaw citing bank robbery crimes.” But that exhibit is not part of the record on appeal, and we presume that had it established the Federal Conviction involved force, violence, or intimidation, the Attorney General would have augmented the record on appeal.

Unlike *Miles, supra*, 43 Cal.4th 1074, it is unclear here whether the Federal Conviction for “bank robbery” was based on the first paragraph of 18 U.S.C. § 2113(a), rather than the second paragraph. Thus, the evidence presented was insufficient to establish the Federal Conviction for bank robbery qualified as a serious felony and strike.

As to the remedy, we agree with the Attorney General. Both the United States Supreme Court and the California Supreme Court have held the prohibitions against double jeopardy do not apply to proceedings in noncapital cases to determine the truth of prior conviction allegations, sentencing enhancements, or penalty allegations. (*Monge v. California* (1998) 524 U.S. 721, 734; *People v. Monge* (1997) 16 Cal.4th 826, 845.) Thus, retrial of an alleged prior conviction is permissible upon the presentation of additional evidence. (*Ibid.*)

DISPOSITION

The judgment is reversed. Upon remand, the trial court shall vacate its true findings regarding the strike allegations. The prosecution may elect to retry the strike allegations by presenting additional evidence within the record of conviction. If the

prosecution opts not to retry the strike allegations, the trial court shall enter “not true” findings. In any event, the trial court shall resentence defendant.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.